Nos. 95-1623, 95-1624

Supreme Court, U.S.
FILED
MAY 17 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

MIKE MOORE, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District of Mississippi

BRIEF OPPOSING MOTION TO AFFIRM

DENNIS L. HORN
(Counsel of Record)
SHIRLEY PAYNE
HORN & PAYNE
P.O. Box 1725
Jackson, MS 39215
(601) 373-0170

WILLIAM E. ANDREWS
P.O. Box 130
Purvis, MS 39475
(601) 794-8053

Counsel for Appellants The Lamar County Board of Education and Trustees, in Their Official Capacities, Robert P. Sandifer, James Siders, Tommy Graham, Freddie G. Howell and Fred Boudreaux

May 17, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF AUTHORITIES

Page

CASES CITED

Clark v. Roemer, 500 U.S. 646 (1991) 2, 4

Greenville Public School District v. Western Line Consolidated School District, 575 So.2d 956 (Miss. 1990), *cert. denied*, 503 U.S. 950, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992) 2

Alexis Lawrence, Guardian and Next Friend on Behalf of Kemmerlyn D. Lawrence, A Minor v. Shirley S. Chater, Commissioner of Social Security, ___ U.S. ___, 116 S.Ct. 604, concurrences and dissents appearing at ___ U.S. ___, 116 S.Ct. 611, 133 L.Ed.2d 545 (1996) 1

Missouri v. Jenkins, ___ U.S. ___, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) 3

Morse v. Republican Party of Virginia, ___ U.S. ___, 116 S.Ct. 1187 (1996) 3

Presley v. Etowah County Comm'n, 502 U.S. 491, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992) 3

Anthony Leo Stutson v. United States, ___ U.S. ___, 116 S.Ct. 600 (1996) 1

U.S. v. Hays, ___ U.S. ___, 115 S.Ct. 2431 (1991) 1

STATUTES CITED

All Writs Act, 28 U.S.C. § 1652 2

Several issues are ignored, and others not adequately addressed, by the Motion to Affirm.

Standing is jurisdictional, may be raised at any time, and intervening decisions from this Court, particularly *U.S. v. Hays*, ___ U.S. ___, 115 S.Ct. 2431 (1991), also merit a revisitation of the standing conundrum presented by the facts of this case. Standing is not decided by way of law of the case in this instance because earlier decisions have been vacated.

The fact that prior decisions have been vacated becomes of paramount importance if the injunction against the repealer of 37-7-611 is overturned, only to reappear under the guise of a ruling from *Dupree I*. Rulings from *Dupree I*, on the attempts by the Mississippi legislature to grant veto power to adjacent county school boards, enacted in 1977 and 1978, were not specifically addressed on appeal when this case came before the Court in 1991. The interpretations of the 1977 and 1978 amendments § 21-1-59, as variously amended since then, which address the same expansions of municipal boundaries as the repealer to 37-7-611 and § 52 of the Uniform School Law, have not been before this Court and are neither decided by this Court nor law of the case. The prior decisions in this action, including the District Court's holding in *Dupree I*, are vacated. *See, Anthony Leo Stutson v. United States*, ___ U.S. ___, 116 S.Ct. 600 (1996); *Alexis Lawrence, Guardian and Next Friend on Behalf of Kemmerlyn D. Lawrence, A Minor v. Shirley S. Chater, Commissioner of Social Security*, ___ U.S. ___, 116 S.Ct. 604, concurrences and dissents appearing at ___ U.S. ___, 116 S.Ct. 611, 133 L.Ed.2d 545 (1996) (applying the term "vacate" in GVR orders).

The All Writs Act, 28 U.S.C. § 1652, is not addressed by the Motion to Affirm. Without direction designed by this Court, however, the All Writs Act is an engine of judicial power that proceeds outside all compass. The interplay of state and federal judicial power is too important to let go by some unspecified dead reckoning.

The Motion to Affirm quotes without comment the statement from the three-judge court below that, "even if § 52 in effect amounted to a repeal of § 37-7-611 by operation of law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." Motion to Affirm, p. 11. It was not the burden of the submitting jurisdiction, under the regulations then existing, or now, to inform the Attorney General of the legal framework under which the Section 5 analysis is to take place. The burden was on the Attorney General to request more information within the statutory time limits, if legal issues did exist. In this case, the Attorney General did not request more information. The Justice Department affirmatively granted preclearance of § 52. No case before this one has even before retroactively denied preclearance.

The Motion to Affirm relies on the opinion from the Northern District of Mississippi in *Nickles v. Western Line Consolidated School Dist.*, No. 4:90-cv-45-BO, that *Greenville Public School District, et al. v. Western Line Consolidated School District, et al.*, 575 So.2d 956 (Miss. 1990), is supplanted by law advanced by *Clark v. Roemer*, 500 U.S. 646 (1991), inexplicably disregarding the fact that *Greenville v. Western Line* was left intact by this the United States Supreme Court after *Clark v. Roemer* was decided. *Greenville Pub. Sch. Dist. v. Western Line Consol. Sch. Dist., supra,*

cert. denied, 503 U.S. 950, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992).

A city school district's remedial measure impacting on extraterritorial school districts was disallowed last term in *Missouri v. Jenkins*, ___ U.S. ___, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995). Here, to the contrary, a Section 5 court has determined that a city school district, to prevent change in voting laws, must take control of extraterritorial school districts. No provisions are made in a remedy to account for the manner that control is to be transferred or exercised. The State law which sets out such transfer and exercise of school powers is the very statute held not precleared, in some as yet undetermined part. The parties are left not knowing how to act to abide by the injunction, if any, of the three-judge court.

Since 1926, since before the passage of the Voting Rights Act of 1964, since before the statutory amendments in 1977 and 1978 controlling boundaries to school districts, since before and after the passage and preclearance of § 52 and the passage and non-preclearance of the repealer of § 37-7-611, whenever a city in Mississippi expanded its boundaries, the new city residents voted in the city elections. There has been no change affecting voting by the change in the school laws in Mississippi. School board members have been, and remain, appointed. There has been no change affecting voting as required for Section 5 jurisdiction. *Morse v. Republican Party of Virginia*, ___ U.S. ___, 116 S.Ct. 1187, 1215 (1996) ("There are already substantial limits as to which voting-related 'practices and procedures' must be precleared. *See Presley v. Etowah County Comm'n*, 502 U.S. 491, 502-503, 112 S.Ct. 820, 828-829, 117 L.Ed.2d 51 (1992) (gathering cases and

setting out four preclearance categories: changes involving 'the manner of voting[,] . . . candidacy requirements and qualifications[,] . . . the composition of the electorate that may vote[,] . . . [and] the creation or abolition of an elective office") (Breyer, J., with whom Justice O'Connor and Justice Souter join, concurring in the judgment).

Section 52 of the Uniform School Law says that county school districts must agree to changes of their boundaries with city school districts. The language itself is inconsistent with 37-7-611 (the repealer of which is said to be not precleared). The regulations in effect at the time of this submission did not require the identification of the prior law being changed. There was no reason, at the time, for Mississippi to make a more specific identification of the law being repealed. *Clark v. Roemer* does not change the rules in effect at the time the submission was made, and does not address the precise issue of what portion of the repealed law, if any, must be submitted. Since all of § 52 was specifically submitted, and precleared, no reading of *Clark v. Roemer* supports the result reached by the three-judge court on remand, to enjoin a previously precleared state statute.

CONCLUSION

The decision of the three-judge court on remand raises more questions than it answers. There was no clear way, under the Supreme Court Rules, for the Court below to certify one or more questions to this Court for review. The conflict between the decision of the Mississippi Supreme Court, for which certiorari was denied by this Court, and the contrary decision by the federal district

court here appealed, requires resolution by exercise of the appellate authority of this Court.

Respectfully submitted,

DENNIS L. HORN
(Counsel of Record)
SHIRLEY PAYNE
HORN & PAYNE
P. O. Box 1725
Jackson, MS 39215-1725
(601) 373-0170

WILLIAM E. ANDREWS, III
P. O. Box 130
Purvis, MS 39475
(601) 794-8053

Counsel for Appellants The Lamar County Board of Education and Trustees, in Their Official Capacities, Robert P. Sandifer, James Siders, Tommy Graham, Freddie G. Howell and Fred Boudreaux

May 17, 1996